

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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KENYON JAMES STARK,

Case No. 2:17-cv-00727-RFB-VCF

Petitioner,

v.

WARDEN BAKER, et al.

ORDER

Respondents.

12 This *pro se* habeas petition comes before the Court on respondents' motion to
13 dismiss (ECF No. 10). Petitioner has not responded, and the time for doing so has
14 expired.

15 Petitioner challenges his state court conviction of five counts of attempt lewdness
16 on a child under the age of 14, which was first entered in the Eighth Judicial District Court
17 on July 10, 2015.¹ (ECF No. 6 at 1-2). Petitioner did not file a direct appeal. He did file a
18 state post-conviction habeas petition, which the trial court mostly denied. (Exs. 67 & 71).
19 However, petitioner's appeal of that decision was dismissed by the Nevada Supreme
20 Court as untimely. (Ex. 83). Petitioner also filed a motion to modify and/or correct illegal
21 judgment in state court, which was denied. (Exs. 73 & 76). Petitioner did not appeal that
22 decision.

23 Respondents move to dismiss the petition as completely unexhausted. Under 28
24 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies on a
25 claim before presenting that claim to the federal courts. To satisfy this exhaustion
26 requirement, the claim must have been fairly presented to the state courts completely

¹ An amended judgment of conviction was entered on October 4, 2017. (Ex. 87). The exhibits cited in this order, comprising the relevant state court record, are located at ECF Nos. 11-13.

1 through to the highest state court level of review available. *E.g., Peterson v. Lampert*,
2 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc); *Vang v. Nevada*, 329 F.3d 1069, 1075
3 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal
4 constitutional guarantee and must also state the facts that entitle the petitioner to relief
5 on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir.
6 2000). That is, fair presentation requires that the petitioner present the state courts with
7 both the operative facts and the federal legal theory upon which the claim is based. *E.g.,*
8 *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement
9 ensures that the state courts, as a matter of federal state comity, will have the first
10 opportunity to pass upon and correct alleged violations of federal constitutional
11 guarantees. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

12 The petition in this case asserts three claims: (1) ineffective assistance of counsel
13 based on (a) the failure to correct untrue factual assertions during petitioner's sentencing,
14 (b) the failure to assist petitioner in withdrawing his plea, and (c) the abandonment of
15 petitioner after sentencing; (2) ineffective assistance of counsel with respect to petitioner's
16 plea deal, resulting in an involuntary guilty plea; and (3) violation of due process based
17 on the State's and counsel's failure to provide petitioner with the discovery in his case,
18 including the victim's statements at the preliminary hearing. (ECF No. 6 at 3, 5 & 7).

19 All three claims were presented in petitioner's state habeas petition. Part of
20 Ground 1 was also asserted in the motion to correct illegal sentence. However, in neither
21 case were the claims thereafter fairly presented to the state's highest courts. Petitioner
22 never appealed the decision on the motion to correct to the Nevada Supreme Court. And
23 as noted, petitioner's appeal of the denial of his state habeas petition was dismissed as
24 untimely. A claim is not fairly presented where it has "been presented for the first and
25 only time in a procedural context in which its merits" are not likely to be considered.
26 *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Because the Nevada Supreme Court lacks
27 jurisdiction over untimely appeals, Nev. Rev. Stat. § 34.575(1); *Lozada v. State*, 871 P.2d
28 944, 946 (Nev. 1994), "[a]n untimely appeal is not a procedure by which the Nevada

1 Supreme Court was likely to address the merits." *Thibes v. LeGrand*, 2013 WL 3930529,
2 at *6 (D. Nev. July 26, 2013). The record does not reflect any other post-conviction petition
3 or motion raising the claims in the petition. Petitioner therefore has not fairly presented
4 any of the claims in his petition to the state's highest court and the entire petition is
5 therefore unexhausted.

6 The unexhausted petition cannot be considered by the Court and is therefore
7 subject to dismissal. Under these circumstances, petitioner has two options. He can either
8 dismiss the petition without prejudice in order to return to state court to exhaust his claims,
9 or move for other appropriate relief, including but not limited to a motion for stay and
10 abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). Petitioner must make an
11 election within sixty days of the date of this order, or the petition will be dismissed without
12 prejudice as unexhausted. Petitioner is advised to familiarize himself with the limitations
13 periods for filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those
14 limitations periods may have a direct and substantial effect on whatever choice he makes
15 regarding his petition.

16 Accordingly, IT IS THEREFORE ORDERED that respondents' motion to dismiss
17 (ECF No. 10) is GRANTED without prejudice.

18 IT IS FURTHER ORDERED that, within sixty days of the date of this order,
19 petitioner shall either (1) file a motion to dismiss the entire petition without prejudice so
20 that he may return to state court to exhaust his claims; or (2) file a motion for other
21 appropriate relief, including but not limited to a motion for stay and abeyance. Failure to
22 timely comply with this order will result in the dismissal of this action without prejudice
23 and without further advance notice.

24 IT IS SO ORDERED.

25 DATED: February 15, 2019.

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE